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ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ERRORS OF CONNECTICUT.²SUPREME COURT OF ILLINOIS.³SUPREME COURT OF MISSOURI.⁴SUPREME COURT OF WISCONSIN.⁵

ACCOMPLICE.

Admission as Witness—Exemption from Prosecution.—The admission of an accomplice as a witness for the government upon implied promise of pardon, in any case, is not at the pleasure of the public prosecutor, but rests in the sound judicial discretion of the court: *Wight v. Rindskoff*, 43 Wis.

If an accomplice in one crime be also indicted for another, and the fact be within the knowledge of the court, he will not, in general, be admitted as a witness; but, if admitted, though he testify in good faith against his accomplices upon one indictment, he will be put upon his trial on the other, and punished upon conviction: *Id.*

An agreement of the public prosecutor, unsanctioned by the court (if such sanction could be given in such a case), for immunity or clemency to several defendants, in several indictments, upon one of them becoming a witness for the prosecution upon still other indictments, would be a fraud upon the court, and an obstruction of public justice: *Id.*

A witness, as such, cannot have an attorney; and though an accomplice may act by advice of his attorney on the question whether he will become a witness for the prosecution, when he once becomes such a witness, the relation of attorney and client ceases *quoad hoc*: *Id.*

AGENT.

Agent to sell—Implied Powers.—An agent authorized to sell goods on commission has no implied power to barter or exchange them, or to pledge them for his own debt. He may receive payment in the ordinary modes of business, but cannot change the security for goods sold, or make himself the debtor of his principal in lieu of the purchaser: *Wheeler & Wilson Manufacturing Co. v. Givan*, 65 Mo.

In suit upon a note given for the purchase-money of a sewing machine bought of plaintiff's agent, it is no defence that the maker has furnished board to the agent in payment of the note under an agreement made at the time of the sale, where it appears that the maker had notice that the agent was not authorized to make such agreement and the plaintiff never consented to it: *Id.*

ATTORNEY. See *Contract*; *Estoppel*.

BANKRUPTCY.

Stay of Suit.—As a bankrupt may waive a discharge when sued be-

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1877. The cases will probably be reported in 5 or 6 Otto.

² From John Hooker, Esq., Reporter; to appear in 44 Connecticut Reports.

³ From Hon. N. L. Freeman, Reporter; to appear in 84 Illinois Reports.

⁴ From T. K. Skinker, Esq., Reporter; to appear in 65 Missouri Reports.

⁵ From Hon. O. M. Conover, Reporter; to appear in 43 Wisconsin Reports.

fore his final discharge, if he wishes to stay proceedings, until the question of his discharge is determined he must plead the proceedings in bankruptcy, or bring them to the knowledge of the court in a proper manner. On suits originating before justices of the peace, this may be done by motion based on a transcript of the proceeding in bankruptcy: *Holden v. Sherwood*, 84 Ill.

COMMON CARRIERS.

Excuse for delay in transit of Goods—Vis major.—In a suit against a railroad company for damages resulting from delay in the transit of freight, it is competent for the company to show that the delay was caused solely by the lawless, irresistible violence of men who were not in the employment of the railroad company: *Pittsburgh, Ft. Wayne & Chicago Railroad Co. v. Hazen*, 84 Ill.

Limiting Liability.—The carrier may limit its obligation to carry safely over its own lines, or only to points reached by its own carriages, and for safe storage and delivery to the next carrier in the route beyond, although the goods are marked to a point beyond its line. A clause in the receipt given the owner for the goods, so restricting the carrier's obligation, if understandingly assented to by the shipper, will as effectually bind him as if he had signed it: *Erie Railway Co. v. Wilcox*, 84 Ill.

CONFISCATION ACT.

Pardon—Effect on sales of Property and payment into the United States Treasury—When the United States are liable in the Court of Claims.—The general pardon and amnesty granted by President Johnson, by proclamation of December 25th 1868, do not entitle one receiving their benefits to the proceeds of his property, previously condemned and sold under the Confiscation Act of 1862, after such proceeds have been paid into the treasury of the United States: *Knote v. United States*, S. C. U. S., Oct. Term 1877.

Whilst a full pardon releases the offender from all disabilities imposed by the offence pardoned, and restores to him all his civil rights, it does not affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. And if the proceeds of the property of the offender sold under the judgment have been paid into the treasury, the right to them has so far become vested in the United States that they can only be recovered by him through an Act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law: *Id.*

To constitute an implied contract with the United States for the payment of money upon which an action will lie in the Court of Claims, there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over, or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. No such implied contract with the United States arises with respect to moneys received into the treasury as the proceeds of property forfeited and sold under the Confiscation Act of July 17th 1862: *Id.*

CONSTITUTIONAL LAW. See *Municipal Corporation*.

Sale of Estate without consent of Remaindermen.—Certain real estate
VOL. XXVI.—35

was devised to A. for life, and after her death upon certain contingencies to B. and others. The General Assembly, upon the petition of A., and against the remonstrance of B. and others, passed a resolution authorizing a sale of the real estate by certain trustees named, and the holding and investing by them of the proceeds for the benefit of all parties interested, according to their respective interests. *Held*, to be constitutional and valid: *Linsley et al. v. Hubbard et al.*, 44 Conn.

CONTRACT.

Against Public Policy.—Courts will always refuse to enforce contracts which are contrary to public morality or policy, whenever and however in actions upon them, that fact may be made to appear: *Wight v. Rinds-kopf*, 43 Wis.

While several indictments were pending in a federal court against defendant and six other persons for violation of the revenue laws, plaintiff told defendant that his relations with the prosecuting attorneys were such that he thought he could render these parties essential service. Thereupon it was agreed between defendant and plaintiff that the former should give evidence for the United States, under the counsel and direction of the latter, against persons other than those included in the agreement, against whom still other indictments for violation of the revenue laws were pending in the same court; and plaintiff undertook that defendant and the other six persons above mentioned should be permitted severally to plead guilty to those counts only, in the several indictments against them, involving the least punishment and receive upon those the lowest punishment of the law; and for this service, if successful, defendant was to pay plaintiff a large sum for each person mentioned. The agreement required no disclosure, evidence or other aid to the government from any other person than defendant and did not require him to make full disclosure to the prosecuting attorneys, or to put himself in their hands as their witness. *Held*, that the services on plaintiff's part thus stipulated for, were not within the legitimate scope of a professional retainer of an attorney-at-law, and a contract therefor is void as against public morality and policy: *Id.*

The mere fact that the judgments of the federal court on the indictments were such as to fulfil plaintiff's agreement, will not warrant this court in assuming that such agreement was sanctioned by that court; nor could it hold the agreement valid even upon that assumption: *Id.*

CORPORATION. See *Evidence*; *Sheriff*.

COURT OF CLAIMS. See *Confiscation Act*.

COURTS. See *Husband and Wife*.

CRIMINAL LAW.

Practice—Trial—Presence of Prisoner.—Unless it affirmatively appears from the record in a criminal case, that the prisoner was present during the progress of the trial, and at the rendition of the verdict, a judgment against him will be reversed: *State v. Able*, 65 Mo.

Accomplice—Murder.—Mere *approval* by a bystander of a murder committed in his presence does not make him an accomplice; and an instruction to the jury that if the defendant was "present, aiding or abetting or counselling or inciting or encouraging or *approving*" the act, is error for which the court must reverse and award a new trial: *State v. Cox*, 65 Mo.

DAMAGES. See *Officer*.

Covenant against Encumbrances—Damages for breach.—Where land is sold with a covenant against encumbrances, and an encumbrance exists of a permanent character, which impairs the value of the premises, and cannot be removed as a matter of right by the purchaser, the damages will be measured by the diminished value of the premises: *Mitchell v. Stanley*, 44 Conn.

The defendants conveyed to the plaintiffs, with a covenant against encumbrances, a tract of land on which there was the following encumbrance: a company owning a canal on which the land abutted, had, by a deed of a former owner, the right to pass and repass upon the land along the canal within two rods of the canal bank, for the purpose of cleaning and repairing the canal, upon paying the owner reasonable damage. In an action for a breach of the covenant, it was found that the actual damage from the exercise of the right to the time of suit was \$10, but that the land was worth \$750 less by reason of the encumbrance. *Held*, that the plaintiffs were entitled to recover \$750: *Id*.

DEED.

Boundary—Warranty—Quantity of Land.—The defendant conveyed to the plaintiff by warranty deed a tract of land described as bounded "North on E. street 189 feet, east on land of P. 147 feet, south on lands of W. and P., in all 189 feet, and west on land of W. 147 feet." The distance between the land of P. on the east and that of W. on the west was only 184 feet. In an action for breach of the defendant's covenant that he was seised of the land described, it was *Held*,

1. That parol evidence was not admissible on the part of the plaintiff, that the defendant, at the time the deed was executed, proposed to describe the north and south lines as "190 feet more or less," and that the plaintiff refused to accept a deed so drawn and told the defendant to fix on such a number of feet as he was willing to warrant, and that the defendant then drew the deed as above.

2. That the description of the land as bounding on P. on the east and on W. on the west was to be regarded as one of greater certainty than the description of the north and south lines by their length, and that therefore the former description controlled the latter.

3. That the deed therefore did not show a clear intent to convey exactly 189 feet of land, and that consequently the covenant of seisin was not to be taken as applying to that quantity: *Elliott v. Weed*, 44 Conn.

EQUITY.

Establishing Title by Estoppel.—A court of equity has jurisdiction to establish a title to real estate by estoppel against a former owner, who by his acts and representations, has induced another to purchase from his grantee under a void deed: *Wade v. Bunn*, 84 Ill.

ERRORS AND APPEALS.

New Trial—New Evidence before the Appellate Court.—The Supreme Court has no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, and the final judgment of such court cannot be examined through its rulings upon that question. If, when the final judgment is brought here for review by writ of error, no other documents are presented for consideration than such

as were before the inferior court upon the application for a new trial, this court cannot look into them, and if error is not otherwise disclosed by the record, the judgment will be affirmed: *Kerr et al. v. Clamptt et al.*, S. C. U. S., Oct. Term 1877.

This court must have before it a bill of exceptions, or what is equivalent to such a bill, upon which the final judgment of the court below was reviewed, or it will not examine into any alleged errors except such as are otherwise apparent on the face of the record: *Id.*

ESTOPPEL. See *Equity*.

Title—Attorney at Law.—Plaintiffs having bought a lot, relying upon the opinion of defendant, an attorney at law, that the title was good, subsequently sold the lot to defendant on credit, giving him a bond for title, and at his request erected a building on it, of which he took and kept possession. In a suit to recover the price of the lot and house, *Held*, that defendant was estopped by these facts to show that plaintiffs had acquired no title to the lot: *Soward et al. v. Johnston*, 65 Mo.

EVIDENCE.

Witness cannot testify to conclusion of Law.—Where two parties are sued as joint feorsors, and a default is taken against one and the other pleads not guilty, it is not competent to permit the one in default to testify that he alone is responsible for the alleged tort: *Hoener v. Koch*, 84 Ills.

To show to whom Goods were really sold—Corporation—Agent.—Parol evidence is admissible to show that goods charged by the plaintiffs to B. were intended for, and sold upon the credit of, a corporation of which he was agent, and that the corporation received the goods and credited the plaintiffs for them: *Northford Rivet Co. v. Blackman Manufacturing Co.*, 44 Conn.

The plaintiffs took the individual note of B. on account of the goods, but it was not given or taken as payment of the account. *Held*, that this did not discharge the liability of the corporation: *Id.*

B. having gone into bankruptcy, the plaintiffs presented the note against his estate and received a dividend upon it. *Held*, that they might show that they did this under the advice of legal counsel, and upon an opinion given that it would not prejudice their claim against the corporation: *Id.*

GUARANTY. See *Municipal Corporation*.

HIGHWAY.

City—Duty in respect of Sidewalks.—A city is bound only to the exercise of reasonable prudence and diligence in the construction of a step from a higher to a lower sidewalk, and is not required to foresee and provide against every possible danger or accident that may occur. It is only required to keep its streets and sidewalks in a reasonably safe condition, and is not an insurer against accidents: *City of Chicago v. Bixby*, 84 Ills.

HUSBAND AND WIFE.

Divorce—Alimony.—Courts in this country possess, in actions for divorce, only the power conferred by statute: *Bacon v. Bacon*, 43 Wis.

The power of courts in this state, in such actions, to divest the husband of the title to realty in favor of the wife, rests entirely on sect. 29,

ch. 111, Rev. Stats., as construed in *Donovan v. Donovan*, 20 Wis. 586, and subsequent cases: *Id.*

Alimony is not an estate, nor part of the husband's estate assigned to the wife as her own, but an allowance, annual or in gross, out of the husband's estate, for the nourishment of the wife; and the court granting it may from time to time revise its judgment, and render such new judgment as it might originally have made, in respect thereto: *Id.*

Except in cases coming within some statutory power, the courts of this state possess no power to revise their judgments after the term at which they are rendered: *Id.*

In sect. 28, ch. 111, Rev. Stats., which authorizes the court, after judgment "for alimony or other allowance for the wife and children," to revise and alter it, the word *allowance* denotes, like alimony, a continued provision for nourishment, and appears to refer to such a provision for the children; the power there granted is inapplicable to a judgment for the division of real property under sect. 29; and such a judgment cannot be revised after the term. *Campbell v. Campbell*, 37 Wis. 206, and *Hopkins v. Hopkins*, 40 Id. 462, as to this point, adhered to: *Id.*

INSANITY.

Responsibility for Acts.—When the mind is so deranged that a person cannot comprehend and understand the effect and consequences of an act, or the business in which he may be engaged, the law will relieve him from his acts: but so long as he is possessed of the requisite mental faculties to transact rationally the ordinary affairs of life, he will not be relieved from the responsibility that rests on the ordinary citizen: *Titcomb v. Vantyle*, 84 Ills.

INSURANCE.

Premium Note—Failure to pay Instalment—Suspension of Risk—Policy to re-attach on Payment.—Where the charter of an insurance company provides that the whole of a premium note payable in instalments shall become due upon failure to pay any instalment for thirty days after notice given to the maker of the default and the penalties incurred under the charter by reason thereof; and by the charter and a policy issued thereunder, such failure does not absolutely avoid the policy, but suspends it so that the company is not liable for a loss occurring during the continuance of such default, but upon the payment of the note (whether voluntarily or enforced) the policy revives and re-attaches, in such case the company may recover the full amount of the note, and not merely such part as would bear the same proportion to the full amount as that portion of the period of the risk prior to the notice of default bears to the entire period covered by the policy. Upon payment of the full amount the insured becomes the owner of a paid-up policy for the remainder of the original term: *American Ins. Co. v. Klink*, 65 Mo.

JUDGMENT. See *Husband and Wife*.

Can only bind Property within the jurisdiction of the Court.—A decree rendered against parties who are beyond the limits of the state upon constructive notice by publication under the Illinois statute, can only affect property within the jurisdiction of the court. The person cannot be bound, unless it has been reached by the process of the court, and as the decree cannot operate extra-territorially, it is impossible that it can bind property thus located: *Harris et al. v. Pullman et al.*, 84 Ills.

LIMITATIONS, STATUTE OF.

Tacking Disabilities.—Where a statute of limitation has once begun to run, no subsequent or supervening disability in the party against whom it is taking effect will arrest its operation. Cumulative disabilities cannot therefore be regarded: *Keil v. Healey*, 84 Ill.

MANDAMUS. See *Office*.

MILITARY OFFICER. See *Officer*.

MUNICIPAL CORPORATION. See *Highway*.

Guaranty—Construction of—Power of Legislature to impose Liabilities on a Municipal Corporation—Retroactive Laws.—Where an ordinance of a city authorizing a contract with a gas company, and the issue to it of bonds of the city provided that the company should “guarantee the said bonds and assume the payment of the principal thereof at maturity:” *Held*, 1. That the guaranty embraced both the principal and interest of the bonds; and, 2. That the ordinance contemplated two undertakings by the company, one to the bondholder and one to the city. The guaranty was to be for the security of the bondholder; it was to be an undertaking to answer for the city’s liability. The other undertaking was to be for the security of the city by placing the company under obligation to provide for the payment of the principal of the bonds on their maturity, an obligation which otherwise would not have existed: *Jefferson City Gas-Light Co. v. Clark and City of New Orleans*, S. C. U. S., Oct. Term 1877.

The endorsement by the president of the company on the bonds guaranteeing “the payment of the principal and interest” thereof was a substantial compliance with the provision of the ordinance and contract as to the guaranty: *Id*.

It is competent for the legislature to impose upon a city the payment of claims just in themselves, for which an equivalent has been received, but which from some irregularity or omission in the proceedings by which they were created cannot be enforced at law: *Id*.

A law requiring a municipal corporation to pay such a claim is not within the constitutional provision inhibiting the passage of a retroactive law: *Id*.

NEGLIGENCE.

Railroad—Neglect to Whistle at Street Crossing—Contributory Negligence of Party injured.—The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on approaching a street crossing, does not relieve a party from the necessity of taking ordinary precautions for his safety. He is bound to use his senses—to listen and to look—before attempting to cross the railroad track, in order to avoid any possible accident from an approaching train. If he omit to use them, and walk thoughtlessly upon the track, he is guilty of culpable negligence, and if he receive any injury, he so far contributes to it as to deprive him of any right to complain. If using them he sees the train coming, and undertakes to cross the track, instead of waiting for the train to pass, and is injured, the consequences of his mistake and temerity cannot be cast upon the railroad company. If one chooses in such a position to take risks he must bear the possible consequences of failure: *Chicago, Rock Island and Pacific Railroad Co. v. Houston*, S. C. U. S., Oct. Term 1877.

To instruct upon assumed facts to which no evidence applies is error. Such instructions tend to mislead the jury by withdrawing their attention from the proper points involved in the issue: *Id.*

Railroads—Dangerous Crossing—Vigilance required of Company and the Public.—Where a railroad company has a dangerous crossing in a crowded city, it must exercise a degree of care to avoid injuring persons and property commensurate with the danger of accident; on the other hand, persons using such a crossing must exercise care and watchfulness commensurate with the danger to which they are exposed: *Harlan v. St. Louis, Kansas City & Northern Railway Co.*, 65 Mo.

The fact that defendant has been guilty of negligence, followed by an accident, does not make him liable for the resulting injury, unless that was occasioned by the negligence: *Id.*

Notwithstanding the injured party may have been guilty of contributory negligence, a railroad company is still liable for the injury if it could have been prevented by the exercise of reasonable care on the part of the company after discovery of the danger in which the injured party stood, or if the company failed to discover the danger through its own recklessness or carelessness, when the exercise of ordinary care would have discovered it and averted the calamity: *Id.*

Where the undisputed evidence showed that the negligence of the deceased contributed directly to produce his death, and that it was not possible after he placed himself in danger to prevent the accident, the railroad company is not liable: *Id.*

NEW TRIAL. See *Errors and Appeals.*

OFFICE AND OFFICER.

De facto—Vacancy—Mandamus—Quo Warranto.—An office is not vacant when there is a de facto incumbent: *Harrison et al. v. Simonds et al.*, 44 Conn.

Such incumbent must be ousted upon an information in the nature of a quo warranto, before the court will grant a mandamus to compel proceedings for filling the office: *Id.*

And the court will not grant a mandamus where it appears that the object sought could have been secured without serious difficulty without the aid of the court: *Id.*

Military Officer—Justification of Trespass by orders—Indian Territory—Damages—All the country described by the first section of the Act of June 30th 1834 (4 U. S. Statutes 729), as Indian country, remains Indian country so long as the Indians retain their title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress: *Bates et al. v. Clark et al.*, S. C. U. S., Oct. Term 1877.

Whatever may be the rule in time of war, and in the presence of actual hostilities, military officers can no more protect themselves in time of peace than civilians for wrongs committed under orders emanating from a source which is itself without authority in the premises. Hence a military officer seizing liquors supposed to be in Indian country when they are not, is liable to an action as a trespasser: *Id.*

The difference between the value of the goods so seized, at the place where they were taken and the place where they were returned to the owners, is the proper measure of damages: *Id.*

PARDON. See *Confiscation Act.*

QUO WARRANTO. See *Office*.

RAILROAD. See *Negligence*.

Duty to furnish safe Machinery.—It is the duty of railroad companies to furnish good, well constructed machinery, adapted to the purposes of its use, of good material and of the kind that is found to be safest when applied to use; and whilst they are not required to seek and apply every new invention, they must adopt such as is found by experience to combine the greater safety with practical use: *I. W. & W. Railway Co. v. Asbury*, 84 Ills.

SHERIFF.

Sheriff interested—Process, Execution of—Coroner.—A sheriff who owns stock in a corporation, has no such interest as will disqualify him, either at common law or under the statute concerning coroners (Wag. Stat. 284, § 3), from executing process in a case to which the corporation is a party: *Hardwick v. Jones et al.*, 65 Mo.

A purchase by a corporation at execution sale is not void because the sheriff conducting the sale is at the time a stockholder in the corporation: *Id.*

STATUTE.

Effect of Repeal on Actions for Penalty, &c.—To save pending actions for statutory penalties, or pending prosecutions for statutory offences, upon the repeal of the statute, an express saving of all penalties incurred or offences committed under it, whether in the course of prosecution or not, is essential: *Rood v. The C., M. & St. P. Railway Co.*, 43 Wis.

SURETY.

Creditor's release of Securities—Effect of.—Release by a creditor of part of the land mortgaged to him as security for payment of a bond, does not discharge a surety in the bond, though made without his consent, if the remainder of the land is sufficient to indemnify him against loss: *Saline County v. Buie et al.*, 65 Mo.

TRUST AND TRUSTEE.

Liability for acts of Co-trustee—Negligence—Fraud.—The questions, how far one trustee will generally be held personally liable for the acts and receipts of his co-trustee, and whether, in case of an executory trust to joint trustees, they will be permitted to sever in their accounts, discussed per RYAN, C. J., but not regarded as open in this case: *Wilcox v. Bates*, 43 Wis.

Trustees in possession are in general chargeable with *actual* receipts only, except upon proof of gross negligence or of fraud in lessening or concealing receipts; and a mere attempt by them to ignore the trust, and deal with the property as their own, is not such a fraud as will charge them beyond actual receipts; nor does it tend to prove, but rather to repel, negligence in the administration of the estate: *Id.*

Certificates of tax sales of trust property, with whatever purpose purchased or held by the trustee are always taken to be purchased and held for the benefit of the estate; and the trustee can charge the estate only with the amount paid and simple interest thereon, and not with the statutory interest accruing on such certificates by way of penalty: *Id.*

UNITED STATES. See *Confiscation Act*.

WITNESS. See *Accomplice*.